

Section 115 Roundtable

**Making & Distributing Digital
Phonorecords
June 15, 2007**

Section 115 Roundtable

Purpose:

To revisit the legal issues concerning whether limited downloads and reproductions made in the course of on-demand streams fall within the scope of the statutory license.

Notice of Roundtable, 72 Fed. Reg. 30039, May 30, 2007.

Section 115 Roundtable Topics

- **How do “Limited Downloads” fit within the scope of the license?**
- **Whether reproductions made during the course of a stream come within the scope of the license?**

Section 115 Roundtable Topics

- **Are server copies which are necessary to transmit Limited Downloads or Streams covered by the statutory license?**
- **Does the statutory license allow for the filing of a single universal “Database” notice upon the copyright owner or an agent of the copyright owner?**

Next Steps

I. Consideration of a Novel Question of Law

Copyright Royalty Judges conducting hearing to set rates for use of the Section 115 license.

<http://www.loc.gov/crb/proceedings/2006-3/index.html#trial>

Next Steps: Novel Question of Law

January 7, 2008, the Digital Media Association (“DiMA”) files a motion with the CRJs requesting referral of a novel question of pursuant to 17 U.S.C. 802(f)(1)(B):

Does “interactive streaming” of a sound recording constitute a digital phonorecord delivery under section 115 of the Copyright Act?

Next Steps: Novel Question of Law

What is a digital phonorecord delivery (DPD)?

A “digital phonorecord delivery” is “each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specially identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording.”

17 U.S.C. § 115(d).

Next Steps: Novel Question of Law

NMPA requests a rate for the “digital delivery” of a sound recording of a musical work, using streaming technology, in response to a request from an end user.

Next Steps: Novel Question of Law

- **RIAA requests a rate for an on-demand digital transmission of a sound recording of a musical work, using streaming technology that . . . will not result in a substantially complete reproduction of a sound recording being made on a local storage device for listening other than at substantially the time of transmission.**

Next Steps: Novel Question of Law

- **February 4, 2008: Copyright Royalty Judges issue Order denying motion for referral of a novel material question of substantive law.**
- **Basis for denial: Question presented a mixed question of fact and law noting that the term “interactive streaming” is neither defined or mentioned in title 17.**

Next Steps

II. Notice of Proposed Rulemaking

Need to clarify whether the Section 115 license covers the reproductions of a sound recording made during the course of a stream.

Review of Copyright Royalty Judges' Decisions

Review of CRJs' Decisions

“The Register of Copyrights may review for legal error the resolution by the Copyright Royalty Judges of a material question of substantive law under this title that underlies or is contained in a final determination of the Copyright Royalty Judges.” 17 U.S.C. § 802(f)(1)(D).

Review of CRJs' Decisions

The CRJs have published three recent decisions setting rates and terms for use of the statutory licenses, 17 U.S.C. §§ 112(e) and 114, governing the public performance of sound recordings by digital transmissions and the making of any number of ephemeral phonorecords to facilitate such performances.

Review of CRJs' Decisions

**Adjustment of rates and terms for
Preexisting Subscription Services, *72 Fed.
Reg. 71795, Dec. 19, 2007***

**Rates and terms for digital performance
right in sound recordings & ephemeral
recordings for a New Subscription Service,
*72 Fed. Reg. 72253, Dec. 20, 2007.***

**Determination of rates and terms for
SDARS, *73 Fed. Reg. 4080, Jan. 24, 2008.***

Review of CRJs' Decisions

In her review of these determinations, the Register of Copyrights identified two legal errors:

The setting a single rate to cover both the public performance of sound recordings under Section 114 and the making of any number of ephemeral phonorecords to facilitate such performances under Section 112(e), and

The failure to set a minimum fee for use of the Section 113(e) license for the satellite services.

Review of CRJs' Decisions

- **Why are these errors important?**

The beneficiaries of the licenses are not the same.

Section 114 royalties are paid to performers and the owners of the sound recordings, whereas the Section 112 royalties are paid only to the copyright owners of the sound recordings and not to the performers.

Review of CRJs' Decisions

- **What is the effect of the Register's review?**

The decision of the Register shall be binding as precedent upon the Copyright Royalty Judges in subsequent proceedings, and

If the CRJs' determination is appealed, the Register may intervene in that proceeding.

Congressional Study Update

Congressional Study

- **Satellite Home Viewer Extension and Reauthorization Act of 2004 requires the Office to conduct a study to examine and compare the statutory licensing systems for the cable and satellite television industries under 17 U.S.C. §§ 111, 119 and 122.**

Congressional Study

***Section 111* permits a cable operator to retransmit both local and distant radio and television signals to its subscribers for a fee.**

***Section 119* permits a satellite carrier to retransmit out-of-market network stations and superstations to its subscribers for private home viewing and to commercial establishments for a fee.**

***Section 122* allows a satellite carrier to retransmit local television signals into the station's local market on a royalty fee basis.**

Congressional Study

Purpose of the Study:

Conduct an analysis of the differences among the three licenses and consider whether they should be eliminated, changed or maintained with the goal of harmonizing their operation.

Propose any necessary legislative changes to address problems and concerns identified in the report.

Congressional Study

- **Published a Notice of Inquiry to collect information from interested parties. *72 Fed. Reg. 19039, April 16, 2007.***
- **Conducted three days of hearings in July, 2007 to gather additional information from the cable, satellite, broadcast and program content industries.**

Congressional Study

Recommendations offered for consideration by interested parties:

- **Eliminate outdated FCC quota rules for signal carriage and eliminate phantom signal problem;**
- **Harmonize the definition for “network station” in section 111 with the definition in section 119;**
- **Reform rate structure in section 111 to ensure faircompensation and provide an audit right to copyright owners; and**
- **Resist expanding section 111 license to include new internet technologies.**

Congressional Study

- **Report due to Congress on June 30, 2008.**
- **Additional information available on Copyright Office website at:**

<http://www.copyright.gov/docs/section109/>

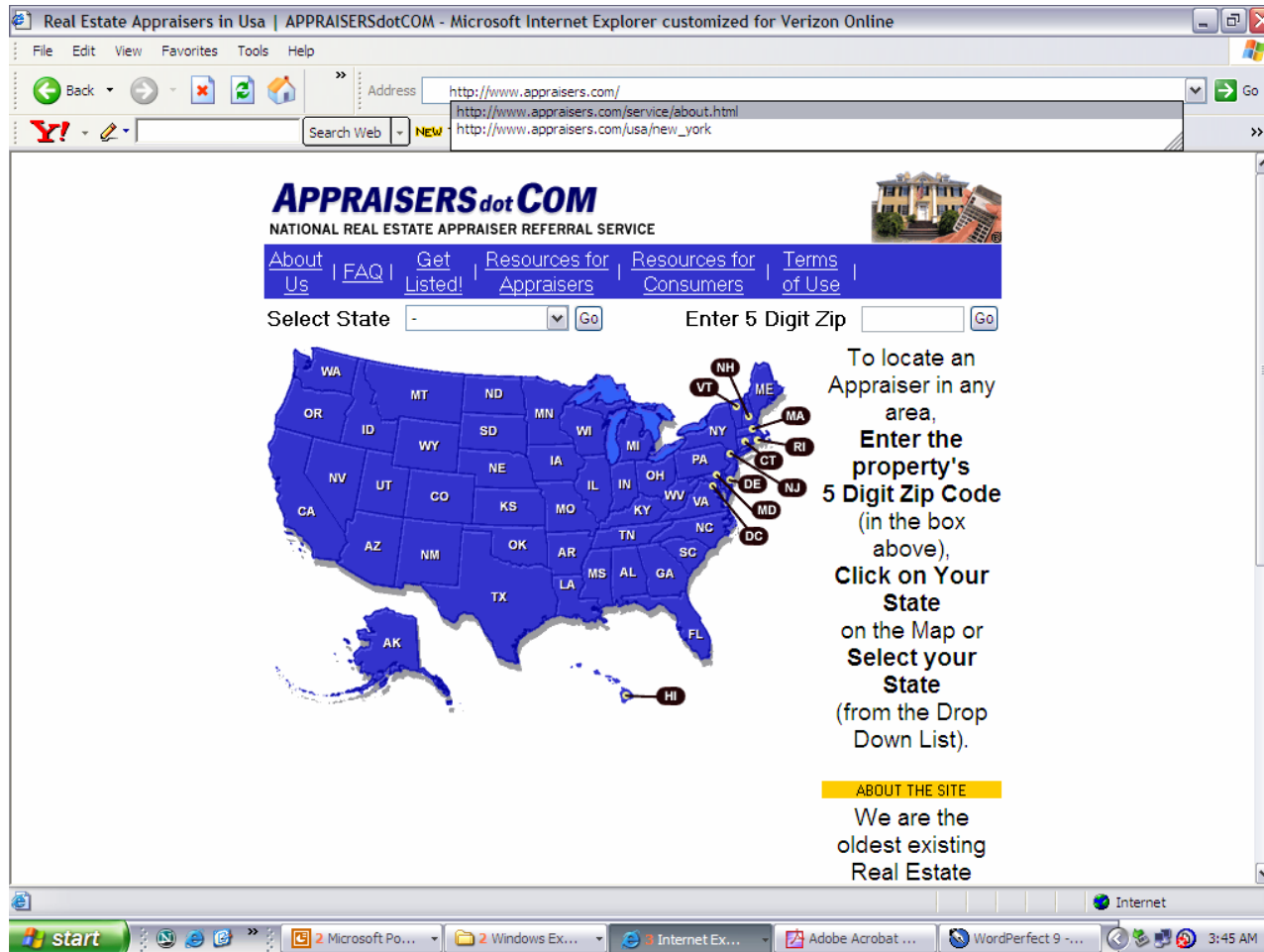
Litigation

Darden v. Peters

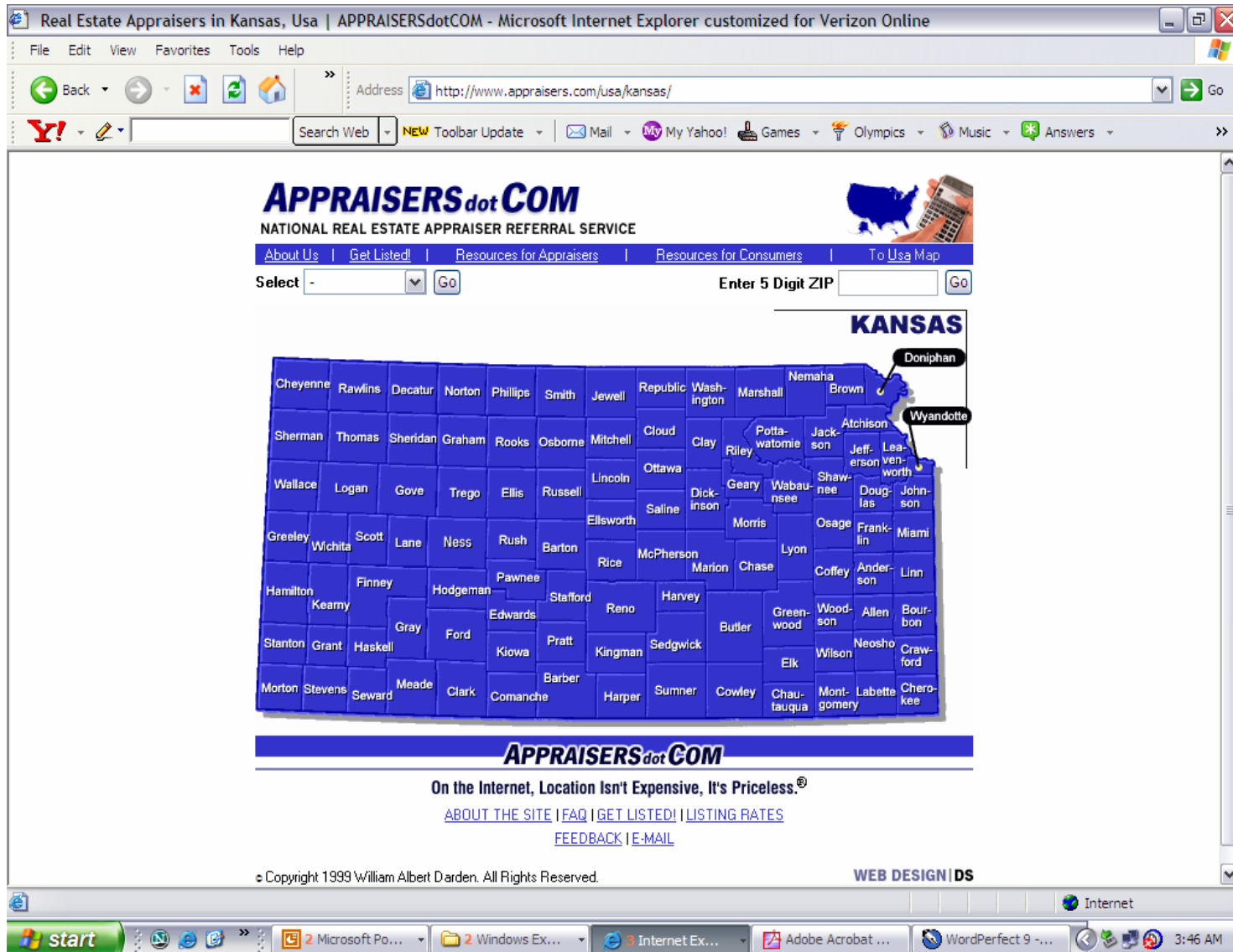
- **Darden challenged the Office's decision to refuse to register stylized maps of each of the states and the layout of his website containing these maps in the U.S. Court of Appeals for the Eastern District Court of North Carolina alleging violation of the Administrative Procedure Act.**

Darden v. Peters

402 F.Supp.2d 638 (E.D.N.C. Dec. 6, 2005)



Darden v. Peters



Darden v. Peters

Maps:

- **Copyright Office determined that the changes to the census maps noted by Plaintiff -- such as layout, format, size, spacing and coloring-- were not registerable.**
- **Copyright Office has determined that shading, coloring or fonts, are not by themselves sufficient to make a work original.**

Darden v. Peters

- **Website: Compilation authorship?**

Plaintiff's request for registration was far too broad since it included a claim for uncopyrightable Maps, unoriginal formatting elements, and an uncreative layout of those elements.

Darden v. Peters

- **The scope of a court's review under the APA's “arbitrary and capricious” standard is narrow.**
- **Rejection was a “carefully reasoned decision that was within the Register's discretion.”**

Darden v. Peter

488 F.3d 277 (4th Cir. 2007)

- **Darden appealed decision to the United States Court of Appeals for the Fourth Circuit, challenging:**

The Register's refusal to register the maps and the website pages, and

The application of the Abuse of Discretion Standard of Review rather than reviewing the Register's decision *de novo*.

Darden v. Peters

- **Fourth Circuit rejected petitioner's argument that 5 U.S.C. §706(2)(A) applied, which requires *de novo* review in determining whether to set aside agency action that is "contrary to a constitutional right, power, privilege, or immunity.**

Darden v. Peters

- **Court held that while the Constitution empowers Congress to enact copyright laws, there is no constitutional right to copyright protection. “Copyright is solely a creature of statute; whatever rights and remedies exist do so only because Congress provided them.”**

Darden v. Peters

- **Court also rejected the petitioner's argument that the Register's decision was not in accordance with law.**
- **Court recognized that the Office had applied the appropriate standard for originality as articulated in *Feist*, and that the Office had considered the relevant facts and legal principles.**

Darden v. Peters

- On October 22, 2007, Darden filed a petition for writ of certiorari.
- The key issue in the petition was whether the Fourth Circuit erred by refusing to interpret copyrightability as a constitutional right subject to *de novo* review under the APA, 15 U.S.C. § 706(2)(B).
- The Supreme Court denied cert on February 25, 2008.